

Board Oversight in the Age of COVID-19

Part 5

By Marguerite C. Bateman, Kimberly Karcewski Vargo, Cathy Gonzales O’Kelly and Bruce A. Rosenblum

April 20, 2020

Part 5 of a weekly series detailing approaches that independent board members are utilizing to address coronavirus-related matters and highlighting emerging issues. [Part 1](#), [Part 2](#), [Part 3](#) and [Part 4](#) of the series may be accessed on our website. Please visit our [Coronavirus Task Force](#) page for more information.

And the beat goes on? This past week the U.S. stock markets continued to rise, even as U.S. unemployment numbers continued to rise even faster. The national conversation has moved to discussions of how and when to begin to re-open the U.S. economy, but the only consensus seems to be that there is no clear answer regarding how best to proceed. So we continue to continue, and evaluate the adjustments to date to accommodate the current “work from home” mandates.

What Are Boards Doing Now?

Board Communications. Boards continue to evolve the nature of the periodic updates they are receiving. In addition to periodic board-level presentations, some committee chairs have added informal calls with their company contacts, which they then report to the full boards by e-mail or at the next full board meeting. Not only are these calls informative, they demonstrate diligence on the part of the board. These and other efforts to stay abreast of developments should be captured in the minutes of the next board meeting.

Future Board Meetings. An increasing number of boards have determined that their May or June meetings will be held virtually. They are taking steps to ensure the success of those meetings:

- Routine agendas are being assessed to consider if certain items can be deferred or instead addressed in a memorandum to the board that is taken “as read” and not discussed during the meeting other than responding to any questions.
- To lighten the load, committee meetings and executive sessions are being held on days without board meetings.
- Presentations are being limited to shorter blocks of time, depending on the subject, or encouraged to be focused on “exception reporting.”
- For meetings over 2-3 hours (video or audio only), breaks are being inserted to allow participants time to stretch and clear their heads.

Conducting Virtual Meetings. We are starting to see trends in how boards are conducting remote board meetings:

- Video conferencing appears preferable to telephonic meetings. We have seen a number of different vendors selected for this purpose. If a video conference is expected, prior to the virtual meeting, management is hosting a “practice session” for trustees to test their ability to access the virtual site. Also, pointers are being discussed, such as muting all microphones that are not in use and protocols for asking questions to avoid speakers talking over one another.

- For all-day meetings, there is a morning session and an afternoon session, each with a comfort break about halfway through. Each session is 2.5 to 3.5 hours long, and separated by a 45-minute lunch break, with participants staying connected to avoid delays in reconvening the meeting.
- If executive sessions and committee meetings will be held on the same day as the board meeting, some boards are using different call-in numbers for executive sessions. This not only preserves the privacy of executive sessions, it avoids the interruptions caused by announcements (which can be silenced) and the addition of pictures as people join for the next session (which cannot be as easily controlled on some hosting sites).

15(c) Requests. Boards and their independent counsel continue to evaluate additional questions for 15(c) Request Letters to include COVID-19 matters, impacts of the recent volatile market (recognizing that there has been a great deal of change since the end of the reporting period), and the utilization of extensions to meet filing deadlines. Boards are requesting and expect to receive some form of “bring down” update from Fund management closer to the date of the meeting.

May/June 15(c) Meetings. For boards with May or June contract renewal meetings, which can involve additional pre-meetings and certainly include an increase in materials, the approaches utilized to manage agendas and the increased volume of materials is evolving. This pressure is more acute for those boards that are using online materials rather than paper for the first time. Some boards that have not previously had pre-meetings have added them to provide an opportunity to raise specific questions that may be able to be resolved in writing in advance of the 15(c) meeting.

What’s Next – Emerging Issues

Below are some emerging issues that came to light over the past week, which boards may want to consider as they continue to exercise their fiduciary duties.

Contract Provisions. In a previous Client Bulletin, we noted that some advisory contracts may include a requirement for the annual contract approval to be voted at an in-person meeting. Because of this contractual requirement, an amendment to the agreement or a waiver is needed for approvals via a telephonic or virtual meeting. We have learned that this same issue may be present for some distribution agreements and 12b-1 plans that likewise require in-person annual approvals.

Disclosure. The SEC has posted a statement on its website reminding registrants to update disclosures when there have been changes and to meet all delivery requirements, including paper prospectuses to new investors. Particular attention should be paid to financial statements, valuation issues, liquidity issues, risk disclosures and disclosures that may be relevant to a particular type of fund. Many registrants make 485(b) filings, typically reserved for nonmaterial changes, at this time of year and may consider additional disclosures in light of the SEC’s statements.

Business Continuity Plans. Most Business Continuity Plans (BCPs) were designed for temporary situations. As pandemic-related mandates require longer term arrangements by the adviser and other key service providers, it will become important to monitor such arrangements for sustainability and address any weaknesses that have become apparent over the extended period of “work from home.”

Closed-End Funds. In conformance with a registration statement undertaking, some closed-end funds have had to suspend offering new shares until such time as an amended prospectus was filed because the priced dropped more than 10% from the NAV at the time of registration. This is most likely to impact funds that release new shares in offerings at market prices. The SEC has provided guidance that, if the decline is due to COVID-19-related market conditions, the undertaking can be satisfied by filing a prospectus supplement under Rule 497 rather than as a post-effective amendment. The guidance also addresses required notification to the Disclosure Review and Accounting Office staff reviewer and suggested disclosure for the prospectus supplement. [Click here](#) for further information.

If you have any questions regarding the topics discussed in this article, please contact **Marguerite C. Bateman** at +1 (202) 312 3033, **Kimberly Karcewski Vargo** at +1 (202) 312 3385, **Cathy Gonzales O’Kelly** at +1 (312) 609 7657, **Bruce A. Rosenblum** at +1 (202) 312 3379 or any Vedder Price attorney with whom you have worked.

vedderprice.com